



(4310-02-P)

DEPARTMENT OF THE INTERIOR

Office of the Secretary

48 CFR Parts 1401, 1452, and 1480

RIN: 1090-AB03

Acquisition Regulations; Buy Indian Act; Procedures for Contracting

AGENCY: Assistant Secretary for Policy, Management and Budget, Interior.

ACTION: Final rule.

SUMMARY: The Department of the Interior is finalizing regulations guiding implementation of the Buy Indian Act, which provides Indian Affairs (IA) with authority to set aside procurement contracts for Indian-owned and controlled businesses. This rule supplements the Federal Acquisition Regulation (FAR) and the Department of the Interior Acquisition Regulation (DIAR).

DATES: This rule is effective on [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

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I. Background

IA has obtained services and supplies from Indian sources using the Buy Indian Program since 1965, based on policy memoranda and acquisition. This rule describes uniform administrative procedures that IA will use in all of its locations to encourage procurement relationships with eligible Indian Economic Enterprises in the execution of the Buy Indian Act.

This rule incorporates the decision of the Assistant Secretary – Indian Affairs to increase economic development and employment of Indian persons by reducing the

percentage of Indian ownership of business enterprises from a mandatory 100 percent to minimum 51 percent.

In addition, the regulations respond to and incorporate the nuances of Section 831 of the National Defense Authorization Act for Fiscal Year 1991 (Pub. Law 101-510, 10 U.S.C. 2301 note) that amended 25 U.S.C. 47 to allow Indian firms to participate in the Department of Defense's Mentor-Protégé Program and not lose their eligibility for contracts awarded under the authority of the Buy Indian Act. This rule includes language stating that participation in the Mentor-Protégé program has no effect on eligibility for contracts awarded under the authority of the Buy Indian Act.

This rule also includes revisions to address the input received as a result of earlier publications and consultation hearings in Indian Country.

Indian economic enterprises interested in contracting with IA should monitor www.FedBizOpps.gov to identify opportunities for which there is a Buy Indian set-aside under this rule.

II. Statutory Authority

The authority to issue regulations is vested in the Secretary of the Interior by 5 U.S.C. 301. The authorizing statute is section 23 of the Act of June 25, 1910 (25 U.S.C. 47, as amended).

III. Overview of Final Rule

This rule supplements the Federal Acquisition Regulation (FAR) and the Department of the Interior Acquisition Regulation (DIAR). For this reason the rule is issued by the Assistant Secretary for Policy, Management and Budget. This rule formalizes an administrative procedure for all IA acquisition activities and locations to

ensure uniformity for eligible Indian Economic Enterprises that submit offers under solicitations set aside under the Act and this part.

A. Numbering System

This rule follows the numbering system established by the FAR and supplements the DIAR. Section 1401.303(a)(3) of 48 CFR authorizes each Interior bureau to codify regulations implementing the DIAR. Where material in the FAR and/or DIAR do not require IA implementing regulations, there will be no corresponding section number in the supplementary material.

B. What This Rule Does

This rule formalizes an administrative procedure for all IA acquisition activities/locations to ensure that IA will apply the procedures uniformly for eligible Indian Economic Enterprises that submit offers under solicitations set aside under the Act. This rule also incorporates Congress's determination that Indian firms should not lose their eligibility for contract awards under the Buy Indian Act due to participation in the Department of Defense's Mentor-Protégé Program.

IV. Development of Rule

A. Prior Publication and Comment Solicitation

This rule has been in development for decades. IA published proposed rules in the Federal Register on October 8, 1982 (47 FR 44678), November 15, 1984 (49 FR 45187), June 30, 1988 (53 FR 24738), and September 12, 1991 (56 FR 46468). Public comments received by IA were reviewed, addressed in succeeding editions, and incorporated in this proposed rule, where applicable.

Notification regarding a series of three public consultation sessions was published in the Federal Register on October 18, 2001 (66 FR 52931). The consultation sessions were conducted in Oklahoma City, Oklahoma, on October 25, 2001; in Scottsdale, Arizona, on November 8, 2001; and in Portland, Oregon, on November 15, 2001.

IA then circulated a draft rule and held a series of three tribal consultation sessions in 2010. The consultation sessions were conducted in Portland, Oregon on April 26, 2010; in Rapid City, South Dakota, on April 28, 2010; and in Tulsa, Oklahoma on April 29, 2010. IA published notice of these consultations in the Federal Register on March 26, 2010 (75 FR 14547).

IA published a proposed rule on July 26, 2012 (77 FR 43782) and hosted four additional tribal consultation sessions: in Albuquerque, New Mexico, on August 14, 2012; in Billings, Montana, on August 15, 2012; in Sacramento, California, on August 21, 2012; and in Prior Lake, Minnesota, on August 23, 2012. A summary of the comments received during these consultations and throughout the public comment period is provided below.

B. Summary of Comments

Most comments were oral at consultation sessions. Only a few written comments were received. The following is a summary of some of the main categories of comments, including oral comments, and IA's responses. Overall, they expressed general support for finalizing the Buy Indian rule as soon as possible.

1. Goals for Set-Asides

Comment: A commenter asked if IA has a goal or will track how many jobs are created in Indian country from this rule.

Response: IA does not speculate on how many jobs are created as a result of contracts it awards; however, IA does track the number of awards under Buy Indian authority and the dollar value of those awards. IA expects the number of awards and dollar value under Buy Indian authority to increase as a result of this rule.

2. Indian Economic Enterprise Definition & Representation

a. Fifty-one (51) Percent Indian Ownership

Comment: A few commenters objected to formalizing by regulation the existing IA policy of having a minimum 51 percent Indian ownership of the Indian economic enterprise for participation in the set-aside awards under the Buy Indian Act. A few commenters stated the minimum should be 80 or even 100 percent Indian ownership to ensure proceeds go to Indian economic enterprises. A commenter who stated that the minimum Indian ownership should be 80 percent stated that doing so would disincentivize “front” companies because such companies would make only 20 percent from the proceeds rather than 49 percent. A commenter who stated the minimum Indian ownership should be 100 percent stated that there should be a tiered system whereby any contractors with 100 percent Indian ownership would get the award and if there were none, then a contractor with 51 percent Indian ownership would get the award. A commenter voiced support for the 51 percent minimum, stating that an increased minimum would make it more difficult to attract business partners to Indian communities.

Response: Before January 1988, IA policy required participant firms to be 100 percent Indian-owned and controlled. IA changed its policy in order to facilitate and expand economic development in Indian communities by increasing the opportunities for

Indian businesses to obtain operating capital, which was often difficult, if not impossible, to do under the "100 percent ownership" policy. IA believes this "minimum 51 percent ownership" requirement is a more realistic requirement that can, with sufficient regulatory safeguards, protect the integrity of the majority Indian owner(s) of the Indian economic enterprise, while promoting economic development. Specifically, IA believes that this minimum is flexible enough to provide an incentive for outside investors to partner with Indian economic enterprises and contribute needed capital and seed money to Indian communities.

In addition, the rule defines Indian economic enterprise to include additional qualifications beyond just 51 percent Indian ownership to help prevent companies “fronting” as Indian economic enterprises. To be an Indian economic enterprise, Indian(s) or tribe(s) must manage the contract, receive the majority of earnings from the contract, and control management and daily business operations. To ensure actual control, the Indians must possess requisite management or technical capabilities directly related to the primary industry in which the enterprise conducts business.

b. Self-Certification

Comment: A commenter expressed concern about having contractors self-certify that they qualify as “Indian economic enterprises” and that IA will accept the certification without looking into financial statements unless someone challenges it.

Response: IA’s self-certification policy is a simple representation statement that an offeror submits to support its claim for eligibility to participate in contract awards under the authority of the Buy Indian Act. The information is required in order for the contractor to obtain a benefit in accordance with the Buy Indian Act. It is the

responsibility of the contractor to examine their own financial statements to determine whether they meet the requirements for qualifying as an Indian economic enterprise. The self-certification approach is consistent with the FAR approach for challenges to small-business set-asides. It is true that IA will look into financial statements only if someone challenges the representation as an Indian economic enterprise, but there are stiff penalties for misrepresentation that should deter contractors from falsely claiming to be an Indian economic enterprise. Misrepresentation of eligibility as an Indian economic enterprise is a violation of Federal criminal statutes. (See 48 CFR 1480.802(c)). In addition, the FAR and DIAR include procedures to address false certification. See FAR 9.406 (Debarment), FAR 9.407 (Suspension), DIAR 1409.406 (Debarment), and DIAR 1409.407 (Suspension).

Comment: A few commenters predicted that having self-certification (rather than a process whereby IA determines, up front, if a contractor qualifies as an Indian economic enterprise) will result in a lot of challenges to representations that contractors qualify as Indian economic enterprises.

Response: IA will monitor the number of challenges to determine whether an approach other than self-certification would be preferable.

Comment: A commenter asked why IA doesn't just require contractors claiming to be Indian economic enterprises to provide an Indian preference form, up-front, as proof.

Response: The form Verification of Indian Preference for Employment in the Bureau of Indian Affairs and Indian Health Service is approved under Office of Management and Budget Control Number 1076-0160, but only for the purpose of

applying for Federal employment. The information on this form may be helpful in a challenge for determining whether 51 percent of the owners of the contracting company are Indian; however, there are other criteria for qualifying for Indian economic enterprises that are not represented by this form (i.e., whether such individuals manage the contract, receive the majority of earnings from the contract, control management and daily business operations and possess requisite management or technical capabilities directly related to the primary industry in which the enterprise conducts business). Therefore, requiring this form up-front would not easily identify whether the contractor qualifies as an Indian economic enterprise.

Comment: A commenter recommended that IA not rely on the Central Contractor Registration (CCR) to identify whether an Indian economic enterprise that self-certified is, in fact, an Indian economic enterprise, because anyone can identify as a Native-owned enterprise in that system without meeting the requirements for an “Indian economic enterprise” under this rule.

Response: IA has determined that CCR is not a reliable source for identifying Indian economic enterprises due to the issue the commenter identified, but may use it in addition to other sources in conducting market research. When making awards, IA will rely on the self-certification statements that are specific to the definition of “Indian economic enterprise” in this rule and carry the weight of penalties for falsification.

Comment: A few commenters suggested that IA establish a repository of Indian economic enterprises, either by setting up a website similar to the Small Business Administration (SBA) or working with the SBA to expand its website to identify Indian

economic enterprises. A commenter noted that other Federal agencies look to IA for information on Indian-owned businesses.

Response: IA agrees that a repository of vetted Indian economic enterprises would be useful and may examine this option in the future, once it has monitored the number of challenges resulting from implementation of the self-certification approach in this rule. Currently, IA regions may have information about Indian economic enterprises in their respective regions and several tribes maintain their own lists of native-owned businesses.

Comment: A commenter asked how IA ensures that Indian economic enterprises are qualified to provide the goods and services for contracts awarded through Buy Indian set-asides.

Response: When awarding Buy Indian contracts, the contracting officer will fulfill their usual responsibilities under the FAR, including examining contractors' past performance to ensure they are qualified.

Comment: A commenter asked how they, as a member of the public, can know the facts to challenge an award on the basis of a business not being small or an Indian economic enterprise.

Response: Dun & Bradstreet is a source for determining whether a contractor meets size limitations for small-business set-asides. As discussed above, there is currently no repository of Indian economic enterprises. A challenger would have to have independent knowledge that a contractor does not qualify as an Indian economic enterprise.

Comment: A commenter stated that preferences and set-asides must be based on tribal membership rather than race because favoritism based on race poses significant constitutional and other legal issues (see, e.g., Civil Rights Act).

Response: The definition of “Indian” is based on membership in a federally recognized Indian tribe, which is a political classification. The definition also includes Alaska “Natives,” as defined by the Alaska Native Claims Settlement Act (Pub. L. 92-203; 85 Stat. 688; 43 U.S.C. 1601).

Comment: A commenter stated that State-recognized Indian tribes that are not federally recognized should be included in this rule.

Response: This rule includes only federally recognized tribes because the rule addresses acquisitions by IA, a Federal agency.

Comment: A commenter noted that the proposed rule’s definition of “Indian economic enterprise” could be interpreted to mean that any one individual Indian must own at least 51 percent of the enterprise, thus excluding enterprises in which one Indian owns 50 percent and another Indian owns the other 50 percent.

Response: We have revised the proposed rule to address this issue. The final rule now specifies that the enterprise may be owned by one or more Indians or Indian tribes and such ownership shall together constitute no less than 51 percent of the enterprise.

c. Challenges to an Entity’s Representation as an “Indian Economic Enterprise”

Comment: A commenter questioned why the process for protesting an entity’s representation as an “Indian economic enterprise” is different from the process of protesting an award under the FAR, and suggested instead relying on the FAR process.

Response: The FAR provides a process for protesting awards to the U.S. Government Accountability Office (GAO), but does not provide for a process to challenge representations as an Indian economic enterprise to IA. This rule establishes a process that is consistent with the FAR but specific to challenges to Indian economic enterprise representations. To avoid confusion with the standard FAR protest process, the final rule uses the term “challenge” instead of “protest.”

Comment: A commenter asked whether it is acceptable to challenge an Indian economic enterprise representation by email.

Response: You may challenge an Indian economic enterprise representation by email under this rule.

3. Restrictions on Construction

Comment: A commenter asked whether surety bond requirements will apply to construction projects awarded under this Buy Indian rule.

Response: The FAR continues to apply to contracts awarded under this Buy Indian rule, so any FAR requirements for a surety bond that would otherwise apply will continue to apply.

Comment: A commenter requested clarification on the applicability of Andrus v. Glover, 446 U.S. 608 (1980), on Buy Indian set-asides for construction and whether the applicability changes depending upon whether the construction will occur on reservation or off reservation.

Response: In response to this comment, IA reexamined and refined its interpretation of applicable law, as stated in the proposed rule. The final rule implements IA’s current interpretation of the Federal Property and Administrative Services Act of

1949 (FPASA), the U.S. Supreme Court decision in Andrus v. Glover, and the subsequent Surface Transportation Assistance Act of 1982 (STAA), Pub. L. 97-424. In light of these legal parameters, IA has determined that it has authority to use funds available for construction of Indian reservation roads by using Indian labor and may use Buy Indian set-asides for the following:

- Road facilities on Indian-owned land;
- Road facilities on an Indian reservation;
- Road facilities that are primary access routes proposed by tribal governments, including roads between villages, roads to landfills, roads to drinking water sources, roads to natural resources identified for economic development;
- Roads that provide access to intermodal termini, such as airports, harbors, or boat landings;
- Bridges along these roads;
- Planning and other needs and facilities associated with roads; and
- Sidewalks along these roads.

IA has determined that it may not use Buy Indian set-asides for other categories of public works including buildings, sewers, water mains, and similar items. The final rule reflects this distinction.

4. Subcontracting

Comment: A commenter asked whether a tribe that received a contract under a Buy Indian set-aside could apply the Buy Indian rule for subcontracting.

Response: The final rule prohibits contractors from subcontracting more than 50 percent of the work under a prime contract awarded under Buy Indian to anyone other

than responsible Indian economic enterprises. Therefore, a tribe that receives a contract under a Buy Indian set-aside would be required to apply the Buy Indian rule to its subcontracts, and could subcontract no less than 50 percent of the work to Indian economic enterprises.

Comment: A commenter stated that all contractors should be prohibited from subcontracting more than 50 percent of the work to anyone other than responsible Indian economic enterprises, even if the prime contract was not awarded under the Buy Indian Act.

Response: Because there are instances where the prime contract cannot be awarded under Buy Indian, the rule requires subcontracting to Indian economic enterprises only when the prime contract was awarded using a Buy Indian set-aside.

5. Buy Indian Implementation by Other Bureaus and Departments

Comment: Several commenters stated that this rule should apply to other agencies, such as the Department of Defense and Indian Health Service, and to other bureaus within the Department of the Interior.

Response: IA has no regulatory authority over other Federal agencies to implement the Buy Indian Act set-aside authority. IA is promulgating this rule; therefore, the rule will apply only to IA. The Secretary of the Interior may delegate Buy Indian authority to other bureaus within the Department of the Interior. Additionally, as a matter of policy, IA encourages other Bureaus and Departments to implement Buy Indian set-aside authority, as appropriate.

6. Awarding

Comment: A commenter suggested allowing IA to negotiate with an Indian economic enterprise on price if only one offeror responds to a Buy Indian solicitation.

Response: We have incorporated this suggestion into the final rule by adding that the contracting officer may negotiate with the Indian economic enterprise if otherwise permitted under the applicable procurement strategy.

Comment: A commenter stated that the rule is clear on what happens if only one offer from an Indian economic enterprise is received and that offer is unreasonable, but is not clear on what happens if one offer from an Indian economic enterprise is received and that offer is reasonable.

Response: Provisions on when deviations are permitted state that receiving only one unreasonable offer is a basis for a deviation. Other sections of the rule, at 1480.503(c) and 1480.504-1(e), state what happens if one reasonable offer is received.

Comment: A commenter asked whether Indian economic enterprises may be granted a 10 percent price preference to give them an advantage where the contract is being advertised under the order of precedence because there were not two reasonable offers under the Buy Indian set-aside.

Response: The contracting officer may give up to a 10 percent preference at his or her discretion, if authorized, considering all applicable factors and circumstances and the preference is included in the solicitation.

7. Applicability to Tribes

Comment: A commenter stated that it was ready to bid on a contract, but the contracting officer instead gave the tribe the opportunity to contract for the program.

Response: The rule provides the Indian tribe with the opportunity to contract under Public Law 93-638 for a requirement taking place on Indian land under its jurisdiction before IA issues a solicitation with a Buy Indian set-aside. A tribal contract under Public Law 93-638 is a non-procurement action, so the tribe would not have to compete for the contract (with or without a Buy Indian set-aside). The rule requires the contracting officer to give written notice to the governing body of the applicable Indian tribe when it publishes the synopsis, stating the intent to contract using a Buy Indian set-aside and providing the tribe with the opportunity to contract. The tribe may contract if it adequately justifies a deviation for the work on or near its Indian land. See section 1480.504-1(b).

Comment: A commenter noted that tribes have access to more capital than individual Indians and could overpower individual business owners in politics and marketing. This commenter stated that if this inequality manifests at some point, IA may want to come up with policies to counter it.

Response: IA is interested in fostering economic development for tribes as well as individual Indians; IA will examine this issue if and when it arises.

Comment: Two commenters stated their strong opposition to exempting tribes that contract or compact Bureau of Indian Affairs functions under Pub. L. 93-638 from the requirements to set-aside their acquisitions under the Buy Indian Act.

Response: The rule does not prohibit tribes from using Buy Indian set-asides for its acquisitions, and tribes may apply the rule in accordance with their respective Self-Determination contracts and compacts and principles of tribal sovereignty.

8. Other

Comment: A commenter asked whether this rule will apply to all offices under the Assistant Secretary – Indian Affairs, or only the Bureau of Indian Affairs.

Response: This rule applies to all offices and bureaus under the Assistant Secretary – Indian Affairs, including the Bureau of Indian Affairs and Bureau of Indian Education.

Comment: A commenter asked whether this rule will apply to personnel and hiring services.

Response: This rule will apply to any contracts IA uses to obtain services, including personnel support obtained by contract.

Comment: A commenter asked whether Alaska Native regional corporations may receive Buy Indian set-asides.

Response: The definition of “Indian tribe” includes Alaska Native villages and regional or village corporations under the Alaska Native Claims Settlement Act. If an Alaska Native regional corporation meets this definition and otherwise qualifies as an Indian economic enterprise, it may receive a Buy Indian set-aside.

Comment: A commenter asked whether there is a graduation out of the Buy Indian set-aside if an Indian economic enterprise exceeds a certain size or number of contracts.

Response: Any entity that qualifies as an Indian economic enterprise may receive an award under a Buy Indian set-aside; there is no graduation out of Buy Indian.

Comment: A commenter asked why the rule specifies that Indian economic enterprises are eligible for Buy Indian set-asides even if they are participating in the Department of Defense’s Mentor-Protégé agreement.

Response: At one point, there was some question as to whether contractors were ineligible for Buy Indian set-asides if they participated in the Mentor-Protégé program. Congress clarified this issue by amending the Buy Indian Act at 25 U.S.C. 47. This rule incorporates that clarification.

Comment: A commenter asked how the Buy Indian set-aside works with 8(a) and historically underutilized business zone (HUBZone).

Response: HUBZone and 8(a) are small business socioeconomic programs under the FAR. If the contracting officer cannot award a Buy Indian set-aside to an Indian economic enterprise, then the contracting officer may solicit under the HUBZone or 8(a) programs under section 19 of the FAR.

Comment: A commenter asked who will be the watchdog to make sure IA implements this rule.

Response: The Director, Office of Acquisitions, will be ensuring that contracting officers implement this rule through Buy Indian set-aside goals and monitoring.

Comment: A commenter asked how to know who IA is awarding contracts to under this rule.

Response: Anyone can track a specific solicitation on FedBizOpps and see who received the award.

Comment: A commenter stated that Buy Indian preference should be higher priority in relation to other procurement programs to allow Indian economic enterprises the opportunity for more market share in major contracts for manufacturing and other industries that have high manpower needs.

Response: This rule will ensure that responsible Indian economic enterprises receive as many IA contract awards as possible. To change the priority among other procurement programs government-wide would require an amendment to the FAR.

Comment: A commenter stated that the solicitations to native businesses should be in layman terms and possibly in each tribe's native language to level the playing field.

Response: The Buy Indian set-aside solicitations will be written in layman terms to the extent possible in compliance with the FAR. Solicitations are provided in English as a common language. The large number of different native languages would render it infeasible to translate every solicitation into each native language without disruptive delays.

Comment: A commenter asked that we avoid any issues with the Paperwork Reduction Act because that process would delay finalization of this rule.

Response: As explained in the Paperwork Reduction Act section of this preamble, this rule does not contain any information collection requirements that trigger the need for OMB approval under the Paperwork Reduction Act.

Comment: A commenter asked whether indefinite delivery-indefinite quantity (IDIQ) contracts may be set aside under this rule.

Response: IDIQs may be set aside under this rule.

Comment: A commenter asked how contracting officers determine whether something is for construction versus services.

Response: Contracting officers will use the FAR to determine whether a contract is for construction or services.

Comment: A commenter stated that it is important for contracting officers to go to FedBizOpps and do a “sources sought” search during market research.

Response: The contracting officers use FedBizOpps as a source when doing market research. Contracting officers may also contact local tribal employment rights offices (TEROs) as part of their market research to ensure that their research was comprehensive.

V. Procedural Requirements

A. Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements. This rule is also part of the Department's commitment under the Executive Order to reduce the number and burden of regulations.

B. Regulatory Flexibility Act

The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). The total annual value of Buy Indian contracts is less than \$45 million awarded to fewer than 200 contractors.

C. Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act.

(a) This rule does not have an annual effect on the economy of \$100 million or more. The annual value of contracts is less than \$45 million.

(b) This rule will not cause any increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. The rule will be applied on a national basis and has no effect on the dollar amount expended for acquisitions.

(c) This rule does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. The annual value of the acquisitions made under this authority is less than \$45 million.

D. Unfunded Mandates Reform Act

This rule does not impose any unfunded mandate on State, local, or tribal governments or the private sector. The rule does not have a significant or unique effect on State, local or tribal governments or the private sector. The rule merely governs acquisitions from contractors.

E. Takings Implications (Executive Order 12630)

In accordance with Executive Order 12630, the rule does not have any takings implications. The rule governs acquisitions from contractors.

F. Federalism (Executive Order 13132)

In accordance with Executive Order 13132, the rule does not have any Federalism implications to warrant the preparation of a Federalism Assessment. The rule governs acquisitions from contractors and does not interfere with the administration of programs by State governments.

G. Civil Justice Reform (Executive Order 12988)

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

H. Consultation With Indian Tribes (Executive Order 13175)

In accordance with Executive Order 13175, IA held consultation meetings with the tribes on draft and proposed versions of this rule, as well as the several previous publications of the proposed rule (see “IV. Development of Rule” of this preamble for details). The rule will more directly affect Indian economic enterprises and any contractors who use the Buy Indian Act for subcontracting.

I. Paperwork Reduction Act

This regulation requires offerors to state whether they meet the definition of an “Indian economic enterprise.” This statement is a simple representation that an offeror submits to support its claim for eligibility to participate in contract awards under the authority of the Buy Indian Act 25 U.S.C. 47, as amended. Because this statement is a

simple certification or acknowledgment, it does not qualify as a collection of information under the Paperwork Reduction Act. See 5 CFR § 1320.3(h).

J. National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 is not required because there is nothing inherent in the rule that will significantly affect the quality of the human environment; the rule merely regulates the implementation of an acquisition authority.

K. Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in Executive Order 13211. A statement of energy effects is not required.

List of Subjects in 48 CFR Parts 1401, 1452, and 1480

Government procurement, Indian Economic Enterprises, Reporting and recordkeeping requirements.

Dated: May 15, 2013

Rhea Suh
Assistant Secretary for Policy, Management and Budget

For the reasons set out in the preamble, the Department of the Interior amends chapter 14 of title 48 of the Code of Federal Regulations as follows:

PART 1401—DEPARTMENT OF THE INTERIOR ACQUISITION REGULATION SYSTEM

1. The authority citation for part 1401 continues to read as follows:

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

2. Add a new section 1401.301-80 to read as follows:

1401.301-80 Policy.

Indian Affairs must use the negotiation authority of the Buy Indian Act, 25 U.S.C. 47 to give preference to Indians whenever using that authority is authorized and feasible. The Buy Indian Act requires that, so far as may be feasible, Indian labor must be employed, and purchases of the products of Indian industry may be made in open market at the discretion of the Secretary of the Interior. This requirement applies notwithstanding any other law and applies to all products of industry, including printing.

PART 1452— SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. The authority citation for part 1452 continues to read as follows:

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

4. Add the following new sections to subpart 1452.2 to read as follows:

Subpart 1452.2 Texts of Provisions and Clauses

* * * * *

1452.280-1 Notice of Indian small business economic enterprise set-aside.
1452.280-2 Notice of Indian economic enterprise set-aside.
1452.280-3 Subcontracting limitations.
1452.280-4 Indian economic enterprise representation.

Subpart 1452.2 Texts of Provisions and Clauses

1452.280-1 Notice of Indian small business economic enterprise set-aside.

As prescribed in 1480.503(d)(3), and in lieu of the requirements of FAR 19.508, insert the following provision in each written solicitation of offers to provide supplies or

services when purchasing commercial items under FAR Part 12 or using simplified acquisition procedures under FAR Part 13. If the solicitation is oral, information substantially identical to that contained in the provision must be given to potential offerors.

NOTICE OF INDIAN SMALL BUSINESS
ECONOMIC ENTERPRISE SET-ASIDE
(JUL 2013)

Under the Buy Indian Act, 25 U.S.C. 47, offers are solicited only from Indian economic enterprises (Subpart 1480.8) that are also small business concerns. Any acquisition resulting from this solicitation will be from such a concern. Offers received from enterprises that are not both Indian economic enterprises and small business concerns will not be considered and will be rejected.

(End of provision)

1452.280-2 Notice of Indian economic enterprise set-aside.

As prescribed in 1480.503(d)(4) and 1480.504-1(f)(5), insert the following clause in solicitations and contracts involving Indian economic enterprise set-asides. If the solicitation is oral, information substantially identical to that contained in the provision must be given to potential offerors.

NOTICE OF INDIAN ECONOMIC ENTERPRISE SET-ASIDE
(JUL 2013)

(a) Definitions as used in this clause.

Indian means a person who is a member of an Indian Tribe or “Native” as defined in the Alaska Native Claims Settlement Act (PL 92-203; 85 Stat. 688; 43 U.S.C. 1601).

Indian Economic Enterprise means any business activity owned by one or more Indians or Indian Tribes that is established for the purpose of profit, provided that: (i) the combined Indian or Indian Tribe ownership shall constitute not less than 51 percent of the enterprise; (ii) the Indians or Indian Tribes shall, together, receive at least a majority of the earnings from the contract; and (iii) the management and daily business operations of an Indian economic enterprise must be controlled by one or more individuals who are members of an Indian Tribe. To ensure actual control over the enterprise, the individuals must possess requisite management or technical capabilities directly related to the primary industry in which the

enterprise conducts business. The enterprise must meet these requirements throughout the following time periods:

- (1) At the time an offer is made in response to a written solicitation;
- (2) At the time of contract award; and,
- (3) During the full term of the contract.

Indian Tribe means an Indian Tribe, band, nation, or other recognized group or community which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, including any Alaska Native village, regional or village corporation established under the Alaska Native Claims Settlement Act (PL 92-203, 85 Stat. 688; 43 U.S.C. 1601).

Representation means the positive statement by an enterprise of its eligibility for preferential consideration and participation for acquisitions conducted under the Buy Indian Act, 25 U.S.C. 47, in accordance with the procedures in Subpart 1480.8.

(b) General.

- (1) Under the Buy Indian Act, offers are solicited only from Indian economic enterprises.
- (2) BIA will reject all offers received from ineligible enterprises.
- (3) Any award resulting from this solicitation will be made to an Indian economic enterprise, as defined in paragraph (a) of this clause.

(c) Required Submissions. In response to this solicitation, an offeror must also provide the following:

- (1) A description of the required percentage of the work/costs to be provided by the offeror over the contract term as required by section 1452.280-3, Subcontracting Limitations clause;
- (2) A description of the source of human resources for the work to be performed by the offeror;
- (3) A description of the method(s) of recruiting and training Indian employees, indicating the extent of soliciting employment of Indian persons, as required by DIAR 1452.226-70, Indian Preference, or DIAR 1452.226-71, Indian Preference Program, clause(s);
- (4) A description of how subcontractors (if any) will be selected in compliance with the "Indian Preference" or "Indian Preference Program" clause(s);
- (5) The names, addresses, and descriptions of work to be performed by Indian persons or economic enterprises being considered for subcontracts (if any) and the percentage of the total direct project work/costs they would be performing;
- (6) Qualifications of the key personnel (if any) that will be assigned to the contract; and
- (7) A description of method(s) for compliance with any supplemental Tribal employment preference requirements, if contained in this solicitation.

(d) Required Assurance. The offeror must provide written assurance to the Indian Affairs that it will comply, or has, complied fully with the requirements of this clause. It must do this before Indian Affairs awards the Buy Indian contract, and

upon successful and timely completion of the contract, but before the Indian Affairs Contracting Officer (CO) accepts the work or product.

(e) Non-responsiveness. Failure to provide the information required by paragraphs (c) and (d) of this clause may cause Indian Affairs to find an offer non-responsive and to reject it.

(f) Eligibility.

(1) Participation in the Mentor-Protégé Program established under section 831 of the National Defense Authorization Act for Fiscal Year 1991 (25 U.S.C. 47 note) does not render an Indian economic enterprise ineligible for contracts awarded under the Buy Indian Act.

(2) If a contractor no longer meets the definition of an Indian economic enterprise after award, the contractor must notify the CO in writing. The notification must include full disclosure of circumstances causing the contractor to lose eligibility status and a description of any actions that the contractor will take to regain eligibility. Failure to give the CO immediate written notification means that: (i) The economic enterprise may be declared ineligible for future contract awards under this part; and (ii) Indian Affairs may consider termination for default if it is in the best interest of the government.

(End of clause)

1452.280-3 Subcontracting limitations.

A contractor shall not subcontract to other than responsible Indian economic enterprises more than 50 percent of the subcontracted work when the prime contract was awarded under the Buy Indian Act. For this purpose, work to be performed does not include the provision of materials, supplies, or equipment. As prescribed in 1480.601(b), insert the following clause in each written solicitation or contract to provide supplies, services, or covered construction:

SUBCONTRACTING LIMITATIONS (JUL 2013)

(a) Definitions as used in this clause.

(1) Concern means any business entity organized for profit (even if its ownership is in the hands of a nonprofit entity) with a place of business located in the United States or its outlying areas and that makes a significant contribution to the U.S. economy through payment of taxes and/or use of American products, material and/or labor, etc. It includes but is not limited to an individual, partnership, corporation, joint venture, association, or cooperative. For the purpose of making affiliation findings (see 19.101) any business entity, whether organized for profit or not, and any foreign business entity, *i.e.*, any entity located outside the United States and its outlying areas.

(2) Subcontract means any agreement (other than one involving an employer-employee relationship) entered into by a Government prime contractor or subcontractor calling for supplies and/or services required for performance of the contract, contract modification, or subcontract.

(3) Subcontractor means a concern to which a contractor subcontracts any work under the contract. It includes subcontractors at any tier who perform work on the contract.

(b) Required Percentages of work by the concern. The contractor must comply with FAR 52.219-14 Limitations on Subcontracting clause in allocating what percentage of work to subcontract. Of the work subcontracted, no more than 50 percent may be subcontracted to a concern other than a responsible Indian economic enterprise.

(c) Indian Preference. Regardless of the contract type for services, supplies, or covered construction, the contractor agrees to give preference to Indian organizations and Indian owned economic enterprises in awarding subcontracts under this contract in accordance with DIAR 1452.226-71, Indian Preference.

(d) Cooperation. The contractor must:

(1) Carry out the requirements of this clause to the fullest extent; and

(2) Cooperate in any study or survey that the CO, Indian Affairs, or its agents may conduct to verify the contractor's compliance with this clause.

(e) Incorporation in Subcontracts. The contractor must incorporate the substance of this clause, including this paragraph (e), in all subcontracts for supplies, services, and construction awarded under this contract.

(End of clause)

1452.280-4 Indian economic enterprise representation.

As prescribed in 1480.801(a), insert the following provision in each written solicitation for supplies, services, or covered construction:

INDIAN ECONOMIC ENTERPRISE REPRESENTATION

(JUL 2013)

The offeror represents as part of its offer that it [] does [] does not meet the definition of Indian economic enterprise as defined in 1480.201.

[End of provision]

5. Add a new subchapter H, consisting of part 1480, to read as follows:

SUBCHAPTER H –INDIAN AFFAIRS SUPPLEMENT

PART 1480—ACQUISITIONS UNDER THE BUY INDIAN ACT

Subpart 1480.1 General

1480.101 Scope of part.

1480.102 Buy Indian Act acquisition regulations.

Subpart 1480.2 Definitions

1480.201 Definitions.

Subpart 1480.3 Applicability

1480.301 Scope of part.

1480.302 Restrictions on use of the Buy Indian Act.

Subpart 1480.4 Policy

1480.401 Requirement to give preference to Indian Economic Enterprises.

1480.402 Delegations and responsibility.

1480.403 Deviations.

Subpart 1480.5 Procedures

1480.501 General.

1480.502 Order of precedence for use of Government supply sources.

1480.503 Commercial item and simplified acquisitions.

1480.504 Other than full and open competition.

1480.504-1 Set-asides for Indian economic enterprises.

1480.504-2 Other circumstances for use of other than full and open competition.

1480.505 Debarment and suspension.

Subpart 1480.6 Contract Requirements

1480.601 Subcontracting limitations.

1480.602 Performance and payment bonds.

Subpart 1480.7 Contract Administration

1480.701 Contract administration requirements.

Subpart 1480.8 Representation by an Indian Economic Enterprise Offeror

1480.801 General.

1480.802 Representation provision.

1480.803 Representation process.

Subpart 1480.9 Challenges to Representation

1480.901	General.
1480.902	Receipt of challenge.
1480.903	Award in the face of challenge.
1480.904	Challenge not timely.

AUTHORITY: 25 U.S.C. 47, as amended (36 Stat. 861), 41 U.S.C. 253(c)(5), and 5 U.S.C. 301.

Subpart 1480.1 General

1480.101 Scope of part.

This part prescribes policies and procedures for the procurement of supplies and services from Indian economic enterprises under the Buy Indian Act, 25 U.S.C. 47, and this part.

1480.102 Buy Indian Act acquisition regulations.

(a) This part supplements Federal Acquisition Regulation (FAR) and Department of the Interior Acquisition Regulation (DIAR) requirements to satisfy the needs of Indian Affairs in implementing the Buy Indian Act.

(b) This part is under the direct oversight and control of the Chief Financial Officer, within the Office of the Assistant Secretary – Indian Affairs, Department of the Interior (CFO). The CFO is responsible for issuing and implementing this part.

(c) Acquisitions conducted under this part are subject to all applicable requirements of the FAR and DIAR, as well as internal policies, procedures or instructions issued by the Indian Affairs. The provisions of the FAR take precedence in all instances where there may be a conflict or discrepancy.

Subpart 1480.2 Definitions

1480.201 Definitions.

The following words and terms are used as defined below unless a different definition is prescribed for a particular subpart or portion of a subpart.

Buy Indian Act means section 23 of the Act of June 25, 1910 (25 U.S.C. 47).

Buy Indian contract means any contract involving activities covered by the Buy Indian Act that is negotiated under the provisions of 41 U.S.C. 252(c) and 25 U.S.C. 47 between an Indian economic enterprise and a Contracting Officer representing the Department of the Interior.

Challenge to representation means an accurate, complete and timely written objection by an interested party to an offeror's representation submitted in response to a solicitation under the Buy Indian Act.

Chief of the Contracting Office (CCO), unless otherwise specified by bureau/office regulation, means the senior GS-1102 within a contracting office. If the CCO is also the CO for an action requiring approval by the CCO, then approval shall be at a level above the CCO in accordance with bureau/office procedures.

Concern means any business entity organized for profit (even if its ownership is in the hands of a nonprofit entity) with a place of business located in the United States or its outlying areas and that makes a significant contribution to the U.S. economy through payment of taxes and/or use of American products, material and/or labor, etc. It includes but is not limited to an individual, partnership, corporation, joint venture, association, or cooperative. For the purpose of making affiliation findings (see FAR 19.101), it includes any business entity, whether organized for profit or not, and any foreign business entity, *i.e.*, any entity located outside the United States and its outlying areas.

Contracting Officer (CO) means a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings on behalf of the U.S. Government.

Covered construction means construction for road facilities on Indian-owned land; road facilities on an Indian reservation; road facilities that are primary access routes proposed by tribal governments, including roads between villages, roads to landfills, roads to drinking water sources, roads to natural resources identified for economic development; roads that provide access to intermodal termini, such as airports, harbors, or boat landings; bridges along these roads; planning and other needs and facilities associated with roads; and sidewalks along these roads.

Day means a calendar day.

Deviation means an exception to the requirement for use of the Buy Indian Act in fulfilling an acquisition requirement of Indian Affairs.

Fair market price means a price based on reasonable costs under normal competitive conditions and not on lowest possible cost, as determined in accordance with FAR 19.202-6(a).

Governing body means the recognized entity empowered to exercise governmental authority over an Indian tribe.

Indian means a person who is a member of an Indian Tribe or “Native” as defined in the Alaska Native Claims Settlement Act (PL 92-203; 85 Stat 688; 43 U.S.C. 1601).

Indian Affairs (IA) means all bureaus and offices under the Assistant Secretary – Indian Affairs.

Indian economic enterprise (IEE) means any business activity owned by one or more Indians or Indian Tribes that is established for the purpose of profit provided that: the combined Indian or Indian Tribe ownership must constitute not less than 51 percent of the enterprise; the Indians or Indian Tribes must, together, receive at least a majority of the earnings from the contract; and the management and daily business operations of an enterprise must be controlled by one or more individuals who are Indians. To ensure actual control over the enterprise, the individuals must possess requisite management or technical capabilities directly related to the primary industry in which the enterprise conducts business. The enterprise must meet these requirements throughout the following time periods:

- (1) At the time an offer is made in response to a written solicitation;
- (2) At the time of contract award; and
- (3) During the full term of the contract.

Indian land means land over which an Indian Tribe is recognized by the United States as having governmental jurisdiction and land owned by a Native corporation established under the Alaska Native Claims Settlement Act of 1971 (85 Stat. 688, 43 U.S.C. 1601), so long as the Native corporation qualifies as an IEE, as defined herein. In the State of Oklahoma, or where there has been a final judicial determination that a reservation has been disestablished or diminished, the term means that area of land constituting the former reservation of the Tribe as defined by the Secretary.

Indian small business economic enterprise (ISBEE) means an IEE that is also a small business concern established in accordance with the criteria and size standards of 13 CFR part 121.

Indian Tribe means an Indian Tribe, band, nation, or other recognized group or community that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, including any Alaska Native village or regional or village corporation under the Alaska Native Claims Settlement Act (PL 92-203, 85 Stat. 688; 43 U.S.C. 1601).

Interested party means an IEE that is an actual or prospective offeror whose direct economic interest would be affected by the proposed or actual IA award of a particular contract set-aside pursuant the Buy Indian Act.

Product of Indian industry means anything produced by an IEE either through physical labor or by intellectual effort involving the use and application of its skills.

Representation means the positive statement by an enterprise of its eligibility for preferential consideration and participation for acquisitions conducted under the Buy Indian Act, 25 U.S.C. 47, in accordance with the procedures in Subpart 1480.8.

Reservation means Indian reservations, public domain Indian allotments, former Indian reservations in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act, 43 U.S.C. 1601.

Subcontract means any agreement (other than one involving an employer-employee relationship) entered into by a Government prime contractor or subcontractor calling for supplies and/or services required for performance of the contract, contract modification, or subcontract.

Subcontractor means a concern to which a contractor subcontracts any work under the contract. The term includes subcontractors at any tier who perform work on the contract.

Work means the level of work effort by the prime contractor based on total direct project costs.

Subpart 1480.3 Applicability

1480.301 Scope of part.

Except as provided in 1480.302 and 1480.401(b), this part applies to all acquisitions, including simplified acquisitions, made by IA and by any other bureau or office of the Department of the Interior delegated the authority to make acquisitions under the Buy Indian Act and 1480.401(d).

1480.302 Restrictions on use of the Buy Indian Act.

(a) IA must not use the authority of the Buy Indian Act and the procedures contained in this part to award intergovernmental contracts to tribal organizations to plan, operate or administer authorized IA programs (or parts thereof) that are within the scope and intent of the Indian Self-Determination and Education Assistance Act. IA must use the Buy Indian Act solely to award procurement contracts to IEEs.

(b) IA must not use the authority of this Act for construction contracts, as defined in FAR 36.102, unless the construction is covered construction, as defined in 1480.201.

Subpart 1480.4 Policy

1480.401 Requirement to give preference to Indian economic enterprises.

(a) IA must use the negotiation authority of the Buy Indian Act, 25 U.S.C. 47, to give preference to Indians whenever the use of that authority is authorized and

practicable. The Buy Indian Act provides that, “so far as may be practicable, Indian labor shall be employed, and purchases of the products (including, but not limited to printing, notwithstanding any other law) of Indian industry may be made in open market at the discretion of the Secretary of the Interior.” Thus, IA may use the Buy Indian Act to give preference to IEEs through set-asides when acquiring supplies, services, and covered construction to meet IA needs and requirements. IA must contract for covered construction in accordance with FAR Part 36.

(b) IA or any other bureau or office of the Department of the Interior delegated the authority to make acquisitions under the Buy Indian Act may not use the Buy Indian Act to give preference to IEEs through set-asides when acquiring construction that is not covered construction.

(c) The provisions of this section shall not apply to the awarding of contracts under the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b et seq.) by the Department of the Interior.

1480.402 Delegations and responsibility.

(a) The Secretary has delegated authority under the Buy Indian Act to the Assistant Secretary - Indian Affairs. IA exercises this authority in support of its mission and program activities and as a means of fostering Indian employment and economic development.

(b) The Secretary may delegate authority under the Buy Indian Act to a bureau or office within the Department of the Interior other than IA only in accordance with the Departmental Manual.

(c) As the head of the contracting activity, the CFO is responsible for ensuring that all IA acquisitions under the Buy Indian Act comply with the requirements of this part.

1480.403 Deviations.

(a) The following officials may authorize a deviation for an IA acquisition:

For a proposed contract action...	The following official may authorize a deviation...
Exceeding \$25,000 but not exceeding \$550,000	The CCO (or the IA Procurement Chief, absent a CCO)
Exceeding \$550,000 but not exceeding \$11.5 million	IA Competition Advocate
Exceeding \$11.5 million but not exceeding \$57 million	The head of the procuring activity, or a designee who is a civilian serving in a position in a grade above GS-15 under the General Schedule or in a comparable or higher position under another schedule
Exceeding \$57 million	Department of the Interior Senior Procurement Executive.

(b) Deviations may be authorized prior to issuing the solicitation when IA makes the following determinations and the appropriate official takes the following actions:

Acquisition Type	Basis for Deviation	Necessary Actions
In pursuit of a simplified or commercial item acquisition in accordance with FAR Parts 12 or 13 and DIAR 1413	IA determines after a market survey that there is no reasonable expectation of obtaining offers that will be competitive in terms of market price, quality, and delivery from two or more responsible ISBEs (or at least from one such enterprise, if the purchase does not exceed the dollar threshold described in FAR 13.003).	The official must: (1) Document the reasons for the deviation in the file; (2) Ascertain the availability of small business suppliers through market research; and (3) If appropriate, compete the purchase using an unrestricted small business set-aside as prescribed in FAR 19.502-2.
In pursuit of all other acquisitions	IA determines that there is no reasonable expectation that offers will be received from two	The official must: (1) Provide a written determination in the contract file stating there is

	or more responsible IEEs at a reasonable and fair market price.	no reasonable expectation of receiving offers from two or more responsible IEEs and that award cannot be made at a reasonable and fair market price; and (2) Proceed with the acquisition using the order of precedence established in FAR 8.001.
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(c) Deviations may be authorized after issuing solicitations when IA makes the following determinations and the appropriate official takes the following actions:

Acquisition Type	Basis for Deviation	Necessary Actions
In pursuit of a simplified or commercial item acquisition in accordance with FAR Parts 12 or 13 and DIAR 1413	Only one offer is received from a responsible ISBEE and the price is unreasonable or no offers are received from a responsible ISBEE.	The official must: (1) Document the reasons for the deviation in the file; (2) Ascertain the availability of small business suppliers through market research; and (3) If appropriate, compete the purchase using an unrestricted small business set-aside as prescribed in FAR 19.502-2.
In pursuit of all other acquisitions	The Indian tribe justifies a deviation under 1480.504-1(b)(2).	IA must proceed under PL 93-638.
	(1) All otherwise acceptable offers received from IEEs are unreasonable; (2) Only one offer is received from an IEE and the CO determines the price to be unreasonable; or (3) No responsive offers have been received from IEEs.	The official must: (1) Cancel the solicitation; (2) Reject all offers in writing in accordance with FAR 14.404-3; and (3) Complete the acquisition by either: (i) Using negotiation, provided the CO has obtained the approval required by FAR 14.404-1; or (ii) If negotiation with the offerors responding to the canceled solicitation is not authorized, the CO must proceed with a new acquisition using the order of precedence in FAR 8.001.

(d) In response to a set-aside acquisition, when using competitive proposals, proposals may be rejected by a written determination by the CCO that a reasonable price cannot be negotiated.

Subpart 1480.5 Procedures

1480.501 General.

All acquisitions made in accordance with this part, including simplified or commercial item acquisitions, must conform to all applicable requirements of the FAR and DIAR.

1480.502 Order of precedence for use of Government supply sources.

Acquisitions made under an authorized deviation from the Buy Indian Act regulation must be made in conformance with the order of precedence required by FAR 8.002.

1480.503 Commercial item or simplified acquisitions.

(a) Each acquisition of supplies, services, and covered construction that is subject to commercial item or simplified acquisition procedures in accordance with FAR Parts 12 or 13 and DIAR 1413 must be set aside exclusively for ISBEEs. IA will use ISBEE commercial item(s) or simplified acquisition set-asides to accomplish this preference action.

(b) If the CO proceeds with an ISBEE commercial item or simplified acquisition set-aside and receives an offer at a reasonable price from only one such responsible economic enterprise (see FAR 19.502-2), the CO must make an award to that enterprise. If the CO proceeds with an ISBEE commercial item or simplified acquisition set-aside

and receives an offer from only one responsible economic enterprise at a price that is not reasonable, the CO may negotiate with that enterprise to reach a reasonable price.

(c) Commercial item or simplified acquisitions under this section must conform to the competition and price reasonableness documentation requirements of FAR 12.209 for commercial item acquisitions and FAR 13.106 for simplified acquisitions.

(d) Clauses and Provisions.

(1) Insert the clause at DIAR 1452.226-70, Indian Preference, in accordance with DIAR 1426.7003(a).

(2) Insert the clause at DIAR 1452.226-71, Indian Preference Program, in accordance with DIAR 1426.7003(b).

(3) Insert the clause at 1452.280-1, NOTICE OF INDIAN SMALL BUSINESS ECONOMIC ENTERPRISE SET-ASIDE in accordance with 1480.503(a).

(4) Insert the clause at 1452.280-2, NOTICE OF INDIAN ECONOMIC ENTERPRISE SET-ASIDE, in accordance with 1480.504-1(a).

(5) Insert the clause at 1452.280-3, SUBCONTRACTING LIMITATIONS, in accordance with 1480.601(b).

(6) Insert the clause at 1452.280-4, INDIAN ECONOMIC ENTERPRISE REPRESENTATION, in accordance with 1480.801(a).

1480.504 Other than full and open competition.

1480.504-1 Set-asides for Indian economic enterprises.

(a) Each proposed procurement for supplies or services that has an anticipated dollar value in excess of the simplified acquisition threshold amount in FAR Part 13.003 must be set aside exclusively for IEEs, and referred to as an "Indian Economic Enterprise

Set-aside," when there is a reasonable expectation that offers will be received from two or more responsible IEEs, and award will be made at a reasonable price except when:

- (1) The acquisition is for construction that is not covered construction, as described in 1480.401(b);
- (2) A deviation has been obtained in accordance with 1480.403; or
- (3) Use of other than full and open competition has been justified and approved in accordance with 1480.504-2.

(b) When acquiring services to be performed in whole or in part on Indian land under a tribe's jurisdiction, the CO must give written notice to the governing body or bodies of the applicable Indian tribe simultaneously with publication of the synopsis required by paragraph (c)(1) of this section. The notice must state IA's intent to solicit services or supplies using an IEE set-aside and provide the tribe with the opportunity to contract for the program within 15 calendar days from the date of the synopsis publication in the GPE.

(1) If the tribe does not oppose the set-aside intention or advise IA by the established deadline of its intent to contract, IA will proceed with the solicitation in accordance with FAR 5.2.

(2) If the tribe advises IA by the established deadline of its intent to contract, it must adequately justify a deviation for work on or near Indian land under its jurisdiction through a tribal resolution in accordance with Pub. L. 93-638.

(c) When using an IEE set-aside in accordance with this section, the CO must do the following:

(1) Synopsise the acquisition in the Governmentwide point of entry (GPE) as required by FAR Subpart 5.2, and identify it as an IEE set-aside.

(2) Use the Class Justification for Use of Other Than Full and Open Competition (JOFOC) in Acquisition of Supplies and Services from Indian Industry to meet the requirements of FAR 6.303.

(3) By separate memorandum to the file, document that the supplies or services to be acquired are available from two or more responsible and IEEs; the anticipated cost to IA of the required supplies or services is determined to be reasonable; and the information in the JOFOC in Acquisition of Supplies and Services from Indian Industry is accurate and complete as it pertains to the proposed acquisition.

(4) Reject offers that fail to provide representation that they meet the definition of an IEE. The CO may also request the Office of the Inspector General (on Form DI-1902 as part of a normal pre-award audit) to:

(i) Assist in determining the eligibility of the low responsive and responsible offerors on Buy Indian Act awards; and

(ii) Determine whether the work will be performed by the labor force required under 1480.601.

(5) When using sealed bidding, determine that the price offered by the prospective contractor is considered to be reasonable and at a fair market price as required by FAR 14.408-2 before awarding a contract.

(6) When using competitive proposals, solicit proposals in accordance with FAR Subpart 15.2 and select sources in accordance with FAR Subpart 15.3 and DIAR Subpart 1415.6.

(7) When using competitive proposals or when negotiating modifications that impact the cost of a contract, conduct proposal analyses, including cost or price analyses in accordance with FAR Subpart 15.4, negotiate profit or fee in accordance with the procedures in FAR Subpart 15.4 and DIAR Subpart 1415.9, and prepare a negotiation memorandum in accordance with FAR 15.406-3 and DIAR 1415.808.

(8) When acquiring architect-engineer services, solicit proposals and evaluate potential contractors in accordance with FAR Part 36 and DIAR Subpart 1436.6.

(d) This paragraph applies to solicitations that are not restricted to participation of IEEs.

(1) If an interested IEE is identified after a market survey has been performed and a solicitation has been issued, but before the date established for receipt of offers, the contracting office must provide a copy of the solicitation to this enterprise. In this case, the CO:

(i) Will not give preference under the Buy Indian Act to the IEE, and

(ii) May extend the date for receipt of offers when practical.

(2) If more than one IEE comes forward subsequent to the solicitation, but prior to the date established for receipt of offers, the CO may cancel the solicitation and re-compete it as an IEE set-aside.

(e) When only one offer is received from a responsible IEE in response to an acquisition set-aside under paragraph (a) of this section:

(1) If the offer is not at a reasonable and fair market price, then the CO may negotiate with that enterprise for a reasonable and fair market price.

(2) If the offer is at a reasonable and fair market price, the CO must:

- (i) Make an award to that enterprise;
 - (ii) Document the reason only one offer was considered; and
 - (iii) Initiate action to increase competition in future solicitations.
- (f) Provisions and Clauses.

(1) Insert the clause at DIAR 1452.226-70, Indian Preference, in accordance with DIAR 1426.7003(a).

(2) Insert the clause at DIAR 1452.226-71, Indian Preference Program, in accordance with DIAR 1426.7003(b).

(3) Insert the clause at 1452.280-2, NOTICE OF INDIAN ECONOMIC ENTERPRISE SET-ASIDE, in accordance with 1480.504-1(a).

(4) Insert the clause at 1452.280-3, SUBCONTRACTING LIMITATIONS, in accordance with 1480.601(b).

(5) Insert the clause at 1452.280-4, INDIAN ECONOMIC ENTERPRISE REPRESENTATION, in accordance with 1480.801(a).

(6) When applicable, Tribal employment preference requirements may be added to the requirements of the clause in accordance with DIAR 1426.7005.

1480.504-2 Other circumstances for use of other than full and open competition.

(a) Other circumstances may exist where the use of an IEE set-aside in accordance with 1480.401(a) and FAR 6.302-5 is not feasible. In such situations, the requirements of FAR Subparts 6.3 and DIAR Subparts 1406.3 apply in justifying the use of the appropriate authority for other than full and open competition.

(b) Except as provided in FAR 5.202, all proposed acquisition actions must first be publicized in accordance with the requirements of FAR 5.2 and DIAR 1405.2.

(c) Justifications for use of other than full and open competition in accordance with this section must be approved in accordance with DIAR 1406. These approvals are required for a proposed contract, or for an out of scope modification to an existing contract.

1480.505 Debarment and suspension.

Violation of the regulations in this part by an offeror or an awardee may be cause for debarment or suspension in accordance with FAR 9.406 and 9.407. IA must refer recommendations for debarment or suspension to the Director, Office of Acquisition and Property Management, Department of the Interior, in accordance with DIAR 1409.406 and 1409.407 through the IA Division of Acquisitions with the concurrence of the head of the contracting activity.

Subpart 1480.6 Contract Requirements

1480.601 Subcontracting limitations.

(a) In contracts awarded under the Buy Indian Act and this part, the contractor must agree to perform the contract in accordance with FAR 52.219-14, Limitations on Subcontracting.

(b) The CO must also insert the clause at 1452.280-3, SUBCONTRACTING LIMITATIONS, in all purchase orders and contracts for services, supplies, or covered construction and awarded to IEEs pursuant this part.

1480.602 Performance and payment bonds.

Solicitations requiring performance and payment bonds must conform to FAR Part 28 and authorize use of any of the types of security acceptable in accordance with FAR Subpart 28.2 or section 11 of Public Law 98-449, the Indian Financing Act

Amendments of 1984. The CO may accept alternative forms of security in lieu of performance and payment bonds according to FAR 28.102 and 25 U.S.C. 47a, if a determination is made that such forms of security provide the Government with adequate security for performance and payment.

Subpart 1480.7 Contract Administration

1480.701 Contract administration requirements.

The CO and the CO's representative (see DIAR 1401.670) must monitor performance and progress to ensure contractor compliance with FAR Part 42 regarding all contract requirements. The CO must ensure contractor compliance with the following provisions of this part:

- (a) Qualification as an IEE as defined in 1480.201;
- (b) Maintenance of the subcontracting limitations required by the clause at 1452.280-3 when acquiring services, supplies, and covered construction; and
- (c) Enforcement of Indian preference requirements contained in DIAR 1426.7004.

Subpart 1480.8 Representation by an Indian Economic Enterprise Offeror

1480.801 General.

(a) The CO must insert the provision at 1452.280-4, INDIAN ECONOMIC ENTERPRISE REPRESENTATION, in all solicitations regardless of dollar value that are set aside for IEEs in accordance this part.

(b) To be considered for an award under 1480.503 or 1480.504-1, an offeror must represent that it meets the definition of "Indian economic enterprise" in response to a specific solicitation set-aside in accordance with the Buy Indian Act and this part.

(c) The enterprise must meet the definition of “Indian economic enterprise” throughout the following time periods:

- (1) At the time an offer is made in response to a solicitation;
- (2) At the time of contract award; and
- (3) During the full term of the contract.

(d) If, after award, a contractor no longer meets the eligibility requirements in paragraph (b) of this section, the contractor must provide immediate, written notification to the CO. The notification must include:

- (1) Full disclosure of circumstances causing the contractor to lose eligibility status; and
- (2) A description of actions, if any, that must be taken to regain eligibility.

(e) Failure to provide immediate written notification required by paragraph (d) of this section means that:

- (1) The economic enterprise may be declared ineligible for future contract awards under this part; and
- (2) IA may consider termination for default if it is determined to be in the best interest of the government.

(f) The CO will accept an offeror's representation in a specific bid or proposal that it is an IEE unless another interested party challenges the IEE representation or the CO has reason to question the representation. Challenges of and questions concerning a specific representation must be referred to the CO or CCO in accordance with Subpart 1480.9.

(g) Participation in the Mentor-Protégé Program established under section 831 of the National Defense Authorization Act for Fiscal Year 1991 (25 U.S.C. 47 note) does not render an IEE ineligible for contracts awarded under the Buy Indian Act.

1480.802 Representation provision.

(a) IA contracting offices must provide copies of the IEE representation to any interested parties upon written request.

(b) The submission of a Solicitation Mailing List Application by an enterprise does not remove the requirement for it to provide representation as an IEE, as required by this part, if it wishes to be considered as an offeror for a specific solicitation. COs may determine the validity of the contents of the applicant's representation.

(c) Any false or misleading information submitted by an enterprise when submitting an offer in consideration for an award set aside under the Buy Indian Act is a violation of the law punishable under 18 U.S.C. 1001. False claims submitted as part of contract performance are subject to the penalties enumerated in 31 U.S.C. 3729 to 3731 and 18 U.S.C. 287.

1480.803 Representation process.

(a) Only IEEs may participate in acquisitions set aside in accordance with the Buy Indian Act and this part. IA procedure supports responsible IEEs and seeks to prevent circumvention or abuse of the Buy Indian Act.

(b) Eligibility is based on information furnished by the enterprise to an IA CO in the IEE representation at 1452.280-4 in response to a specific solicitation under the Buy Indian Act.

(c) The CO may ask the appropriate Regional Solicitor to review the enterprise's representation.

(d) The IEE representation does not relieve the CO of the obligation for determining contractor responsibility, as required by FAR Subpart 9.1.

Subpart 1480.9 Challenges to Representation

1480.901 General.

(a) The CO can accept an offeror's written representation of being an IEE (as defined in 1480.201) only when it is submitted with an offer in response to a solicitation under the Buy Indian Act. Another interested party may challenge the representation of an offeror or contractor by filing a written challenge to the applicable CO in accordance with the procedures in 1480.902.

(b) After receipt of offers, the CO may question the representation of any offeror in a specific offer by filing a formal objection with the CCO.

1480.902 Receipt of challenge.

(a) An interested party must file any challenges against an offeror's representation with the local CO.

(b) The challenge must be in writing and must contain the basis for the challenge with accurate, complete, specific, and detailed evidence. The evidence must support the allegation that the offeror is either ineligible or fails to meet both the definitions of "Indian" and of "Indian economic enterprise" established in 1480.201. The CO will dismiss any challenge that is deemed frivolous or that does not meet the conditions in this section.

(c) To be considered timely, a challenge must be received by the CO no later than 10 days after the basis of challenge is known or should have been known, whichever is earlier.

(1) A challenge may be made orally if it is confirmed in writing within the 10-day period after the basis of challenge is known or should have been known, whichever is earlier.

(2) A challenge may be made in writing if it is delivered by hand, telefax, telegram, or letter postmarked within the 10-day period after the basis of challenge is known or should have been known, whichever is earlier.

(3) A CO's objection is always considered timely, whether filed before or after award.

(d) Upon receiving a timely challenge, the CO must:

(1) Notify the challenger of the date it was received, and that the representation of the enterprise being challenged is under consideration by IA; and

(2) Furnish to the economic enterprise (whose representation is being challenged) a request to provide detailed information on its eligibility by certified mail, return receipt requested.

(e) Within 3 days after receiving a copy of the challenge and IA's request for detailed information, the challenged offeror must file with the CO a complete statement answering the allegations in the challenge, and furnish evidence to support its position on representation. If the offeror does not submit the required material within the 3 days, or another period of time granted by the CO, IA may assume that the offeror does not intend to dispute the challenge and IA must not award to the challenged offeror.

(f) Within 10 days after receiving a challenge, the challenged offeror's response and other pertinent information, the CO must determine the representation status of the challenged offeror and notify the challenger and the challenged offeror of the decision by certified mail, return receipt requested, and make known the option to appeal the determination to the Office of Acquisition and Property Management, Department of the Interior (PAM).

(g) If the representation accompanying an offer is challenged and subsequently upheld by the PAM, the written notification of this action must state the reason(s). The PAM may review the economic enterprise for possible suspension or debarment recommendations.

1480.903 Award in the face of challenge.

(a) Award of a contract in the face of challenge may be made on the basis of the CO's written determination that the challenged offeror's representation is valid.

(1) This determination is final for IA unless it is appealed to the PAM, and the CO is notified of the appeal before award.

(2) If an award was made before the time the CO received notice of appeal, the contract must be presumed to be valid.

(b) After receiving a challenge involving an offeror being considered for award, the CO must not award the contract until the CO has determined the validity of the representation, or 10 days have expired since the CO received the challenge, whichever occurs first. Award must be made when the CO determines in writing that an award must be made to protect the public interest, or the supplies and services are urgently required, or a prompt award will otherwise be advantageous to the Government.

(c) If a timely challenge on representation is filed with the CO and received before award in response to a specific offer and solicitation, the CO must notify eligible offerors within one day that the award will be withheld and a time extension for acceptance is requested.

(d) If a challenge on representation is filed with the CO and received after award in response to a specific offer and solicitation, the CO need not suspend contract performance or terminate the awarded contract unless the CO believes that an award may be invalidated and a delay would prejudice the Government's interest. However, if contract performance is to be suspended, a mutual no cost agreement will be sought.

1480.904 Challenge not timely.

If a CO receives an untimely filed challenge of a representation, the CO must notify the challenger that the challenge cannot be considered on the instant acquisition but will be considered in any future actions. However, the CO may question at any time, before or after award, the representation of an IEE.

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